Lembaga Pelabuhan Johor v Panglobal Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-165 OF 1996
KAMALANATHAN RATNAM JC
13 JANUARY 1997

Civil Procedure *— Summary judgment — Application for — Triable issues — Performance and advance payment bonds — Non-compliance with — Whether triable issues*

The plaintiff claimed in respect of two agreements made between the plaintiff and the defendant, ie: (i) a performance bond whereby the defendant guaranteed payment of a certain sum after receiving a written notice from the plaintiff in respect of the proper performance of a building contract ('the building contract') between Rolet Construction ('Rolet') and the plaintiff; and (ii) an advance payment bond whereby the defendant irrevocably undertook to pay the plaintiff on demand the outstanding amounts owing and unpaid by Rolet to the plaintiff. The plaintiff subsequently determined the building contract. The plaintiff by two letters dated 30 October 1992 notified the defendant of the determination and requested the defendant to make payment pursuant to the terms of the performance bond and advance payment bond. The defendant failed to comply with the notices. Consequently, the plaintiff proceeded with this action. The senior assistant registrar dismissed the plaintiff's application for summary judgment. The plaintiff appealed.

Held, dismissing the appeal with costs:

(1) It was a requirement of the bonds that the defendant be notified of any concession or indulgence. Since there was an extension of time given by plaintiff to Rolet without the defendant being notified, the defence had raised an arguable issue (see p 508G–H).

(2) The letter of demand dated 30 October 1992 was not in strict compliance with cl 2 of the performance bond. Therefore, the defendant had indeed raised a triable issue as to its validity and effectiveness (see p 510G).

[Bahasa Malaysia summary

Plaintif membuat tuntutan berkenaan dengan dua perjanjianyang dibuat di antara plaintif dan defendan, iaitu: (i) bon pelaksanaan yang mana defendan menjamin bayaran suatu jumlah tertentu selepas menerima notis bertulis daripada plaintif berhubung dengan pelaksanaan wajar suatu kontrak bangunan ('kontrak bangunan tersebut') di antara Rolet Construction ('Rolet') dan plaintif; dan (ii) bon bayaran pendahuluan yang mana defendan mengakujanji

untuk membayar plaintif atas tuntutan amaun terhutang yang harus dibayar dan belum dibayar oleh Rolet kepada plaintif. Plaintif kemudiannya menamatkan kontrak bangunan tersebut. Plaintif menerusi dua pucuk surat bertarikh 30 Oktober 1992 memaklumkan penamatan itu kepada defendan dan meminta defendan supaya membuat bayaran menurut terma bon pelaksanaan dan bon bayaran pendahuluan. Defendan gagal mematuhi notis-notis tersebut. Akibatnya, plaintif meneruskan tindakan ini. Penolong kanan pendaftar menolak permohonan plaintif untuk penghakiman terus. Plaintif merayu.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah satu keperluan bon-bon tersebut bahawa defendan diberitahu mengenai apa-apa konsesi atau perlonggaran. Memandangkan terdapat pelanjutan masa yang diberikan oleh plaintif kepada Rolet tanpa dimaklumkan kepada defendan, pihak pembelaan telah membangkitkan isu yang boleh dihujahkan (lihat ms 508G–H).

(2) Surat tuntutan bertarikh 30 Oktober 1992 tidak mematuhi fasal 2 bon pelaksanaan secara ketat. Maka, defendan memang telah membangkitkan isu yang boleh dibicarakan atas kesahan dan keberkesanannya (lihat ms 510G).]

Notes

For cases on application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4436–4446.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly know as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 51 (refd)

Edward Owen v Barclays Bank [1978] 1 QB 159 (refd)

Esso Petroleum (M) Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (refd)

Kejuruteraan Awam Cang Ceng (M) Sdn Bhd v The Standard Chartered Bank [1991] 3 CLJ 2502 (refd)

Midland Counties Motor Finance Co Ltd v Slade [1951] 1 KB 346 (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp [1987] 2 MLJ 610 (refd)

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd [1989] 3 MLJ 155 (refd)

Ivan Loo (*Skrine & Co*) for the plaintiff/appellant.

Amudha Jayaraman (*Murali B Pillai & Associates*) for the defendant/respondent.

A *Cur Adv Vult*

Kamalanathan Ratnam JC: This is an appeal by the plaintiff against the decision of the learned senior assistant registrar ('the SAR') in dismissing the plaintiff's application for summary judgment. The plaintiff's claim is for the sum of RM407,279.47 together with interest thereon at the rate of 8% per annum from 30 October 1992 in respect of two agreements made between the plaintiff and the defendant. This first agreement is a performance bond dated 5 July 1991 issued by the defendant in favour of the plaintiff for the sum of RM304,647.95 whereby the defendant guaranteed to pay the sum after receiving a written notice to do so from the plaintiff in respect of the proper performance of building contract between Rasdi bin Rozali t/a Rolet Construction ('Rolet') and the plaintiff. The second agreement is an advance payment bond dated 5 July 1991 issued by the defendant in favour of the plaintiff for the amount of RM913,943.85 whereby the defendant irrevocably undertook and guaranteed to pay the plaintiff on demand the outstanding amounts owing and unpaid by Rolet to the plaintiff in respect of the advance payment made to Rolet by the plaintiff. In respect of the advance payment bond, the outstanding amounts unpaid by Rolet as at 4 September 1992 was RM102,650.52. The plaintiff determined the building contract pursuant to the terms in the said contract as of 20 October 1992. By a letter dated 30 October 1992, the plaintiff informed the defendant of the said determination as of 20 October 1992 and required the defendant to pay the plaintiff the sum of RM304,647.95 pursuant to the terms of the performance bond. Pursuant to another letter also dated 30 October 1992, the plaintiff informed the defendant of the said determination and demanded the balance sum RM102,650.52 due pursuant to the advance payment bond. Since the defendant had failed to pay the total sum of RM407,297.47, the plaintiff proceeded with this action.

Are the performance bond and advance payment, bond guarantees?

The plaintiff submits, relying on *Shell Marketing Co of Borneo Ltd v Tan Sri Datuk Wee Boon Ping* [1990] 1 CLJ 564, that essentially a performance bond and an advance payment bond are guarantees and that they should be given their reasonable business meaning.

In reply, the defendant argued that whilst it has been the practice to equate performance guarantee to that of a letter of credit, however, in *Esso Petroleum (M) Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, Peh Swee Chin SCJ deprecated from endorsing the view of Lord Denning in *Edward Owen v Barclays Bank* [1978] 1 QB 159 wherein Lord Denning had said:

> ... these performance guarantees are virtually promissory notes payable on demand.

It was the view of the Federal Court that such a description:

> ... could have served to cloud the real issue — which is one of contractual interpretation of a performance bond and not of the nature of transaction.

In the circumstance, the defendant submitted that one has to look into the intention and obligation of the parties to the bond. A

The defendant submitted that the plaintiff had granted extension of time of three weeks to Rolet to complete the building contract without giving notice of the same to the defendant as was required under the bonds. Evidence of this was a letter dated 22 July 1992 from the plaintiff to Rolet together with the certificate of extension of time which said letter was annexed as an exh OSK-2 to the defendant's affidavit. It is significant to note that no copy of the said letter dated 22 July 1992 was extended to the defendant. B

The plaintiff's reply to this was to fall back on the interpretation given by Peh Swee Chin SCJ in *Esso Petroleum*. I am now asked to look at the real issue as to when the defendant's obligation arose and find that it is based on a contractual interpretation which involved a straight forward exercise of construction of the terms of the performance bond and the advance payment bond. C

On this concession alone, I ought to dismiss this appeal of the plaintiff. Clause 4 of the performance bond reads: D

> Penggerenti tidak boleh dibebas atau dilepaskan daripada gerenti ini oleh sebab apa-apa perkiraan yang dibuat di antara Kontraktor dengan Lembaga sama ada dengan/atau tanpa persetujuan penggerenti atau oleh sebab apa-apa perubahan tentang kewajipan-kewajipan yang telah diakujanji oleh Kontraktor atau/oleh sebab pihak Lembaga menangguhkan pembayaran, masa perlaksanaan atau lain-lain, tetapi penggerenti adalah berhak diberitahu mengenai perkiraan atau perubahan tersebut. E

Clause 2 of the advance payment bond reads:

> Any concession indulgence give by Lembaga to the Contractor of any agreement between Lembaga and the Contractor or any alteration in the obligation undertaken by the Contractor or any forbearance given by Lembaga to the Contractor whether as to payment, time, performance or otherwise shall not discharge us from the guarantee but we shall be entitled to be informed of such arrangements or alterations. F

G

Giving these two bonds the contractual interpretation that I am bound to give, I cannot but conclude that it was a requirement of the bonds that the defendant be notified of any concession or indulgence. Since there was clearly an extension of time given by plaintiff to Rolet without the defendant being notified, the defence has raised an arguable issue. The interpretation as proffered by Peh Swee Chin SCJ in *Esso Petroleum* is clearly sound law because it removes the shackles that have bound a guarantor from performing its obligations even if there are flagrant breaches, so long as the beneficiary makes an 'on demand' call. By looking into the contractual interpretation of the terms of the bond, a court has to see if there are any obligation on the part of the beneficiary to fulfil, notwithstanding the fact that the bond might seemingly be an unconditional or 'on demand' bond. In fact, this view was upheld by Mohamed Dzaiddin FCJ in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly know as Maltran Air Services Corp* H I

Sdn Bhd) and another appeal [1996] 2 MLJ 517 at p 536F–H where he said:

> From the above conclusion of the learned judge, we form the view that she has construed AC4 as a conditional guarantee, although recognizing that it is an 'on demand' guarantee. However, in arriving at her conclusion that the payment out of the sum of RM400,000 under the said guarantee was lawfully made, we find that she had applied the same approach as in *Esal* [1985] Lloyd's Rep 546 where Ackner LJ accepted the alternative submission of counsel for OCL that in addition to the beneficiary of the performance bond making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. Needless to say, in the circumstances of the present case, we consider this to be the correct approach.

Further this type of approach blends well with the position of the law as propounded by the then Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 wherein Lee Hun Hoe CJ (Borneo) said:

> The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of the instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken.

The defendant is therefore entitled to insist that the plaintiff complies strictly with the terms of the performance and advance payment bonds. In *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346 which was a hire purchase case there was a similar term pertinent to the present case. The term in the guarantee agreement reads:

> ... this guarantee shall not be in any way be avoided, released or affected by reason of any breach or breaches (wilful or otherwise) of the said agreement committed (with or without my knowledge or consent) by the company nor by the company giving time to the hirer or granting him any other indulgence or by the company or the hirer making any variation to the said agreement. Provided that no such variation shall make me liable for a greater maximum sum under this guarantee than that for which I am liable as the said agreement now stands. Also provided that the company shall inform me when any payment or instalment shall be more than 30 days overdue.

The plaintiff brought an action against the guarantor to recover monies outstanding but the guarantor, relying on the clause emphasized above, contended that payment by the hirer had become 30 days overdue on 30 November but he was not informed of the same until 28 December and as such, he was released from his obligation under the guarantee. The relevant passage of the judgment of Somervell LJ is at p 351:

> On the other hand, the construction put forward by the defendant, the guarantor, seems to me the natural construction, having regard to the place of the relevant words in the agreement, and also I think is what one would expect. It is in substance a proviso to this effect: 'You can enlarge the time, but if you enlarge it for a period longer than 30 days beyond the original date in the original agreement, then you must let me know'. I think that that

> is what a guarantor might well require to know. After the grant to the creditor in very wide words of a power to give time or other indulgence, I would expect a provision: 'If you extend the time for payment by more than a certain period, inform me, the guarantor: I may have rights, or I may have persuasive powers, or I may be able to get things on a more satisfactory basis; but I cannot allow you to go on extending time indefinitely without my being informed'.

Invalid letter of demand dated 30 October 1992

The defendant argued that cl 2 of the performance bond states:

> Penggerenti akan membayar ganti rugi kepada Lembaga sebanyak RM304,647.95 ... dalam tempoh tiga bulan selepas menerima satu notis bertulis menghendaki penggerenti membayar kepada Lembaga.

This clause clearly states that the defendant is bound to pay the said sum within three months form the date of receipt of written demand. However, the demand notice dated 30 October 1992 stipulated that the said sum ought to be paid within 14 days. The defence submitted that this, in no uncertain terms, flawed the notice of demand. The plaintiff has not adequately replied this submission.

It is trite law that where the relevant document states that a demand must be made, the said demand is therefore a condition precedent to the commencement of the cause of action. In *Mok Hin Wah & Ors v United Malayan Banking Corp* [1987] 2 MLJ 610 at p 611 (SC), Salleh Abas LJ said:

> ... Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor.

It is also trite law that the demand must conform strictly to the terms of the guarantee. See *Kejuruteraan Awam Cang Ceng (M) Sdn Bhd v The Standard Chartered Bank* [1991] 3 CLJ 2502 at p 2505, where the court held that it must be satisfied that the demand complies strictly with terms of the guarantee. In the circumstances, I find that the letter of demand dated 30 October 1992 is not in strict compliance with cl 2 of the performance bond and that therefore the defendant has indeed raised a trial issue as to its validity and therefore effectiveness.

For the purposes of this appeal, I need not go into the other issues raised by the defence. Suffice it to say I am more than convinced that the defence has raised trial issue and that this appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee